IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL, CIVIL JURISDICTION

WRIT PETITION NO.197 OF 1993

Subhag S. Kavi)
residing at A/10,, Sangita,)
S.V. Road, Borivli (West))
Bombay-400 092.)..PETITIONER

Versus

1. State of Maharashtra)
2. Deputy Director of Technical)
Education.)
3.The Kandivli Education Society)
4.Sardar Vallabbhai Patel)
Vividhlakshi Vidyalaya &)
Junior College.)..RESPONDENTS

Mr. M.P. Vashi with Ms. B. D'Souza for petitioner

Ms. Mugdha Jadhav, AGP for respondent Nos.1 and 2.

Mr. Suresh Kumar Panickar with Ms. Pallavi
Vishwasrao for Respondent Nos.3 and 4.

CORAM: **F.I. REBELLO &**

MRS.V.K.TAHILRAMANI, JJ.

DATE: 27TH JUNE,2006

ORAL JUDGMENT (PER F.I. REBELLO, J.)

. The petitioner was in the employment of

Respondent No.4 School.A complaint was filed against the petitioner dated 13th September, 1991 at the Kandivali Police Station alleging that the School Leaving Certificate of one student by name Ms. Jigna Jayantilal Kanakia was forged. Based on the complaint a case was registered by the Borivali Police Station against the petitioner and two others under Sections 467 and 467 and other provisions of the I.P.C. The petitioner was arrested on 5th October, 1991 and released on bail on 8th October, 1991. The managing committee at the meeting held on 16th October, 1991 passed a resolution to suspend the petitioner with retrospective effect from 6th October, 1991. Pursuant to the suspension correspondence was exchanged between the petitioner on the one hand and the respondent management on the other. It was the case of the petitioner that the charges against him were false and fabricated and that he was innocent. As no charge sheet was served for acts of misconduct, petitioner addressed a letter to the Deputy Director of Technical Education dated 12th October, 1992 with a request to direct the management to reinstate the petitioner and withdraw the suspension order. There was subsequent correspondence. However, the suspension was not revoked. The petitioner, however, was paid subsistence allowance. The petitioner thereafter filed the present petition wherein he has prayed that the order of suspension be quashed and that he be

paid the arrears of salary amounting to Rs.64,368/- from 1st October, 1991 to 31st January, 1993. During the pendency of the petition the petitioner has superannuated on 6th July, 1996. The petitioner presently is being paid provisional pension in terms of the Rules as the criminal case is still pending. Even at the time of superannuation no charge sheet was served on the petitioner. It is in these circumstances that the reliefs as prayed for.

2. On behalf of the management, the Headmistress has filed an affidavit wherein the case of the petitioner has been set out. It has been set out that there is no need to file a charge sheet on the petitioner considering the provisions of M.E.P.S. Rules 1981 in order to conduct a domestic enquiry. In so far as the salary is concerned, it is submitted that the respondents are prohibited from paying salary considering the Rules in force. For all the aforesaid reasons it is prayed that the petition be dismissed. In the additional affidavit filed on 10th July, 1998 it has been set out that the Department of Education has granted approval to the order of suspension by the letter dated 29th September, 1992. It is pointed out that there are serious criminal charges against the petitioner and proceedings are pending. No relief can be granted as claimed by the petitioner and further the petition has become infructuous.

. On behalf of the Department affidavit has been filed by Vijay Punju Khairnar setting out that the approval was granted to suspend the petitioner and that the petitioner has been paid subsistence allowance. On superannuation he has been paid dues. An additional affidavit was filed on 21st November, 2005 setting out that the respondent No.2 approved the suspension subject to the provisions of the M.E.P.S. Act.

3. The issue before us is whether it was open to the respondents to continue the petitioner on suspension without issuing charge sheet. For that purpose we may gainfully refer to some of the provisions of the M.E.P.S.Regulation Act, 1977 to the extent they are required for disposal of the present controversy. As some judgments were pointed out to us in the matter of period of suspension we propose to deal with that argument also so as to clarify the issue of law. The relevant Rules are Rule 33(1) and Rule 33(5) and (6) which read as under:-

"33(1) If an employee is alleged to be guilty of any of the grounds specified in sub-rule (5) of rule 28 and if there is reason to believe that in the event of the guilt being proved against him, he is likely to be reduced in rank or removed from service, the Management shall first decide whether to hold an inquiry and also to place the employee under suspension and if it decides to suspend the employee,

it shall authorise the Chief Executive Officer to do so after obtaining the permission of the Education Officer or, in the case of junior College of Education and Technical High Schools,of the Deputy Director. Suspension shall not be ordered unless there is a prima facie case for his removal or there is reason to believe that his continuance in active service is likely to cause embarrassment or to hamper the investigation of the case. If the Management decided to suspend the employee, such employee shall, subject to the provisions of sub-rule (5) stand suspended with effect from the date of such order."

"33(5) An employee against whom proceeding have been taken on criminal charge or who is detained under any law for the time being in force providing for preventive detention shall be considered as under suspension for any period during which he is under detention or he is detained by police for judicial custody for a period exceeding forty-eight hours or is undergoing imprisonment, and he shall not be allowed to draw any pay and allowances for such period until the termination of the proceedings taken against him or until he is relieved from detention and is in a position to rejoin duty after producing documentary proof of his release (otherwise than on bail) or acquittal, as the

case may be. An adjustment of his pay and allowances for such periods shall be made according to the circumstances of the case, the full amount being given only in the event of the employee being acquitted of charge or detention being held by the Court to be unjustified.

(6) After the result of the criminal prosecution, a copy of the judgment shall be obtained by the Management and if the judgment is one of the conviction for the charges and if any inquiry is also initiated by the Management against the employee on the basis of the same charges, it shall not be necessary to proceed with the inquiry on the basis of the same charges, it shall not be necessary to proceed with the inquiry on the same charges and the Management shall take action to terminate the services of the employee. The Management shall not however pas any order till the period upto which the employee is entitled to prefer an appeal or revision application to the higher Court against the conviction by the lower Court is over. If the appeal or revision application is preferred the Management shall not take any action till the conviction is finally confirmed by the higher Court. When the

judgment in the criminal case appeal or revision application is one of acquittal, the Management shall consider in the light of the judgment whether it is necessary to institute or proceed with the inquiry. If the Management agrees that the acquittal is justified, it may drop the inquiry by certifying that it agrees with the findings of the Court. If the Management does not agree with the findings, it may proceed with the inquiry and inflict proper punishment."

The other Rule which is relevant is Rule 34(3) which reads as under:-

"34(3) In case an employee under suspension attains the age of superannuation while under suspension he shall be deemed to have been retired on attaining the age of superannuation and any departmental or Judicial proceedings pending against him shall be continued ever after his retirement. A provisional pension not exceeding the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the employee or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed

under suspension shall be paid to him. But no amount of Death-cum-Retirement Gratuity shall be paid till his case is finally decided. Where an employee is acquitted of the charges and he is not proceeded against by the Management under sub-rule (6) of rule 33 his case shall be regulated by sub-rule (5) if his suspension is held to have been wholly unjustified, and by sub-rule (6) if it is held to have been wholly justified."

4. It was sought to be contended before us on behalf of the petitioner that the petitioner could not have been kept on suspension beyond the period of arrest. The petitioner was arrested on 5th October, 1991 and released on 8th October, 1991and as such his suspension could only be for that period and he could not have been continued under suspension thereafter. For that purpose reliance is sought to be placed on Rule 33(5) which we have earlier reproduced. From a careful reading of Rule 33(5) the following emerges:-

. By a deeming fiction of law, if a person is under detention or is detained by police on criminal charges and is in custody for a period of more than 48 hours or has undergone imprisonment then he continues under suspension for that period and is not allowed to draw any pay and allowances for such period until the termination of the proceedings held

against him or until he is released from detention and is in a position to resume duty after producing documentary proof of his release or as the case may be. Rule 33(5), therefore is attracted in only these situations.

. The ordinary power of suspension however is provided under Rule 33(1) which is an independent power in the management to suspend an employee if it prima facie is of the opinion that his continuance in service is likely to cause or hamper the investigation of the case. Therefore, Rule 33(1) is a power conferred on the management to suspend an employee pending a departmental enquiry, if there be serious charges of misconduct, whereas Rule 33(5) operates by fiction of law in a case where a person is arrested for more than 48 hours on criminal charges or was under detention.

5. With that background let us examine as to whether the rulings cited before us on behalf of the petitioner in support of his contention that the period of suspension is limited to the period of arrest and/or detention supports his case. We may firstly refer to the judgment of a Division Bench of this Court in **Dilip Venkatrao Patil vs. State of Maharashtra, 1997 (3) Mh. L.J. 279.** In that case the learned Division Bench was considering the issue as to whether Rule 33(5) contemplates automatic

suspension. We may at once point out that the judgment in Dilip Venkatrao Patil was based on the judgment in the case of **Vanmala S. Aney vs. National Education Society**, **1982 Mh. L.J. 403**. A Full Bench of this Court in **Awdesh Narayan K. Singh vs. Adarsh Vidya Mandir Trust & Anr., 2004 (1) ALL MR 346** was considering the issue of the power of the management to suspend. After considering the law the Full Bench of this Court in paragraph 59 was pleased to hold that Vanmala did not lay down the correct law on the point and is overruled the same. All subsequent decisions either following or reiterating Vanmala also stand overruled. To that extent the judgment in Dilip Venkatrao Patil (supra) which took the view that the power of suspension has to be exercised by the management with the prior approval of Education Officer is no longer good law. Our attention was then invited to the judgment in **Vasant Haribhau Ugale vs. State of Maharashtra & Ors., 2004 (4) Bom.C.R.375**. In that case the employee was suspended for five days after he was released from custody, the Education Officer refused to release the salary. The learned Division Bench held that the Education Officer was within his authority. It appears that the Division Bench again relied upon the judgment in Vanmala as also Dilip Venkatrao Patil which has now been overruled. However, in so far as the issue of salary is concerned, considering the language of Rule 33(5), we are of the opinion that

the suspension would continue only during the period of arrest or period of detention in terms of that Rule. On release from judicial custody or from detention the deemed suspension would cease to operate. In the event the management still prefers to suspend the employee, that can be independently done, by exercising the power under Rule 33(1). Our attention was also invited to the judgment in the case of Shri Madhukar Namdeo Patil vs. Chairman Sudhagad Education Society & Ors., 2000 (4) Bom. C.R.698. A learned Division Bench held, that under Rule 33(5), a person could be kept under suspension only for that period. We have no difficulty in holding that the view taken would be in consonance with Rule 33(5). It is not necessary to refer to some other judgments which were cited at the Bench. The position in law, therefore, would be clear that Rule 33(1) is a power in the management to suspend an employee with or without the permission of the Department, whereas Rule 33(5) is a deemed suspension, if the predicates set out therein are satisfied. On behalf of the respondents learned Counsel sought to draw our attention to the judgment of the Apex Court in **Union of India vs.Rajiv Kumar, AIR 2003 SC 2917** to point out that once a person is deemed to be suspended under Rule 33(5) that must continue for all time. We are afraid we cannot subscribe to that view. The Apex Court in Union of India vs. Rajiv Kumar (supra) had considered Rule

10(5)(a) of the Central Civil Services (Classification, Control and Appeal) Rules 1965. That Rule specifically provides that the order of suspension made or deemed to have been made under the Rules shall continue to remain in force until it is modified or revoked by the authorities. There is no such lprovision in the Act or the Rules. We, therefore, find no substance in the contention as urged on behalf of the respondents. Even otherwise in our opinion that issue would not arise, considering the rules and the facts of the present case are concerned.

. In the instant case apart from deemed suspension, the management had independently exercised the power of suspension. That would be under Rule 33(1). This power in the management has been accepted by the Full Bench of this Court, in Awdesh Narayan K.Singh's case (supra). That issue, therefore, is no longer res integra.

6. The question that arises is whether the petitioner is entitled to the reliefs as prayed for. Admittedly, in the instant case till such time as the petitioner superannuated no charge sheet was served on the petitioner. It is not open to an employer to keep the employee suspended for an unduly long period without serving the charge sheet. The petitioner has specifically raised such a ground being Ground (b) in

the petition. We have earlier reproduced Rule 33(6). Rule 33(6) would be attracted in the event, if during the pendency of a criminal proceedings, an enquiry was initiated. It is open to the management in such a case if an enquiry was initiated based on the criminal proceedings not to proceed with the enquiry if there be conviction, but to pass an order of dismissal based on the order of conviction itself subject to the safeguards as are set out thereof. In case of an acquittal it is still open to the management to proceed with the enquiry. This, however, would be subject to the condition that disciplinary proceedings had been initiated and were pending before the superannuation of the employee. Rule 34(3) only sets out that if employee is under suspension on reaching the age of superannuation he shall be deemed to have retired. However, it will be open to the employer inspite of superannuation, to continue the departmental proceedings even after his retirement. In the instant case no departmental proceedings were pending. That Rule therefore, would not be applicable. On the facts of the present the petitioner was suspended with effect from 6th October, 1991 and he superannuated on 5th July, 1996. The petitioner approached this Court in the year 1993 to quash the order of suspension, on the ground that even after three years no charge sheet had been served upon him. On behalf of the respondents their learned Counsel submits that this was because of the

pendency of the criminal proceedings. We are afraid that it was not open to the management to continue the suspension without issuing the charge sheet. Issuing of charge sheet would prima facie indicate that the management proposes to hold an enquiry for serious misconduct against the employee. In the absence of charge sheet it is not possible to believe that the petitioner was guilty of serious misconduct even if there be criminal proceedings. In our opinion, therefore, the continued suspension of the petitioner was without authority of law.

7. The petitioner, however, contends that the suspension itself was illegal. We are afraid we cannot subscribe to that submission. It is always open to the management pending charge sheet to suspend an employee, if the management is of the opinion that the petitioner is guilty of gross misconduct. In the instant case though there is a criminal case pending against the petitioner, the management did not think it fit, to serve a charge sheet on the petitioner, may be on a wrong notion of law. That, however, is no answer so as to continue the suspension. We are, therefore, of the opinion that the continued suspension of the petitioner after 8th October, 1992 would be arbitrary and illegal as a period of one year could be the maximum period which the management could avail of to serve the charge sheet. Failure to serve charge sheet after 16th

October, 1992 would, therefore, be clearly without the authority of law.

8. In the light of that, we are clearly of the opinion that the continued suspension after 16th October 1992 is without the authority of law and consequently we quash the order of suspension from 16th October, 1992. The petitioner would be entitled to consequential benefits including wages from the date the order of suspension is set aside, till the date of his superannuation. The subsistence allowance paid will be adjusted against the back wages due and payable.

. Rule made absolute accordingly. In the circumstances of the case there shall be no order as to costs. As the criminal proceedings are still pending the petitioner will only be paid provisional pension. Other benefits will be dependent on the conclusion of the criminal proceedings and according to law.

(F.I. REBELLO, J)

(MRS.V.K.TAHILRAMANI, J).